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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TEITELBAUM & TEITELBAUM,
Counsel for Petitioner,
1482 Broadway,
New York 36, N. Y.

MORRIS TEITELBAUM,
PAULINE TEITELBAUM,
of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Toffenetti Restaurant Company, Inc., the petitioner herein prays that a writ of certiorari issue to review the order and decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled cause on January 10, 1963 granting the enforcement of the order of the National Labor Relations Board directing the Company to cease and desist certain acts found to be unfair labor practices under sec. 8(a)(1, 3, 5), of the National Labor Relations Act, 29 U. S. C., sec. 158(a)(1, 3, 5), and to take certain affirmative action to effectuate the policies of the act.

NOTE: The National Labor Relations Board is referred to hereinafter as the Board.

The Petitioner shall hereinafter be referred to as the Employer.

B. A. refers to Board's Appendix in the United States Court of Appeals.

R. A. refers to Employer's Appendix in the United States Court of Appeals.

It is the Employer's contention that the decision of the United States Court of Appeals and the order of the Board are in direct conflict with the decisions of the Courts and the National Labor Relations Board. They are contrary to the National Labor Relations Act and are in other respects contrary to law and facts.

The Employer further contends: The Board was without jurisdiction of the subject matter. The remedies provided for in the order do not effectuate the policies of the Act. The Board usurped the functions of United States Treasury Department by their unilateral imposition of new terms for an existing Government approved profit-sharing plan without first securing the Treasury Department's approval. The Board modified the collective bargaining contract by creating new financial burdens on the Employer in violation of the due process clause of the United States Constitution.

Opinion Below

The opinion of the Circuit Court of Appeals for the Second Circuit is unreported and is printed in Appendix A, *infra*, page 42.

Jurisdiction

Jurisdiction of the Court is invoked under 28 U. S. C., Sec. 1254(1).

A Petition was filed by the Company for a rehearing *in banc* as only three judges decided the cause and same was denied without argument on December 26, 1962, on the ground that no active Circuit Judge requested that the Case be reheard *in banc* (Appendix B, *infra*, page 43).

The decree was entered on January 10, 1963 (Appendix C, *infra*, page 44).

A motion was made in the United States Court of Appeals to stay the execution of the decree pending this application for Certiorari and was granted on January 10, 1963 (Appendix D, *infra*, page 46).

Questions Presented

I. (a) Does the Board have jurisdiction to abrogate, modify, supplement, compel concessions or sit in judgment upon the substantive terms of a collective bargaining contract and previously Government approved profit-sharing plan?

(b) Can the Board *ipso facto* enlarge the terms of an existing written collective bargaining contract creating new and additional financial burdens on an Employer and are such additional burdens in violation of the due process clause of the United States Constitution?

(c) Does the Board have jurisdiction to grant bonuses that are not authorized by the written collective bargaining contract?

(d) Does the Board have jurisdiction to make Unit employees participants in a profit-sharing plan by establishing accounts for them therein and in other respects alter or regulate the plan without authorization in the written collective bargaining contract and without the approval of the United States Treasury Department?

(e) Where two branches of the United States Government, the N. L. R. B. and the Treasury Department, are in conflict on the legality of the terms of the profit-sharing plan and amendments, which determination shall prevail?

II. (a) Does the Board have jurisdiction of the subject matter where the collective bargaining contract provides "that there will be *no strike* or *lockouts* as to any dispute which may arise during the term of this agreement"? (Article XIV of the contract, B. A. 273.)

(b) Does the Board have jurisdiction of the subject matter where the collective bargaining contract provides that "any dispute arising out of the interpretation or application of the agreement" shall be resolved through "grievance and arbitration procedure," with no right to the arbitrator "to change or otherwise modify any of the provisions of this Agreement"? (Article XII of the Contract, B. A. 273.)

(c) Where the collective bargaining contract provides for grievance and arbitration procedure, must the disputes be channeled through such procedure and does refusal to bargain independently constitute unfair labor practice within the meaning of the Act?

III. Are purported discriminatory acts and purported disparate treatment which did not, do not and can not discourage membership in the Union, sufficient evidence to constitute unfair labor practice in violation of Section 8(a)(3) of the Act?

IV. (a) Are purported conversations, declarations, proposals during negotiations and other purported acts, occurring prior to the signing of the collective bargaining contract, competent evidence to vary and substitute the terms of such written contract and sustain inferences of unfair labor practices in violation of Section 8(a)(1, 3, 5)?

(b) Are inferences reasonable and considered substantial evidence upon which to make findings of unfair labor practices, when based on other inferences, inconsistent inferences, conversations during negotiations, other acts or statements which tend to vary the terms of the written collective bargaining contract?

(c) Does the Board have jurisdiction to make findings of unfair labor practices where there are no allegations in the complaint to sustain such findings?

V. Is a purported lack of evidence on the part of Employer competent to sustain an inference of violation of Section 8(a)(1, 3, 5) or does the burden of proof always remain on the Board to sustain such violation?

VI. (a) May the Board infer refusal to bargain in violation of Section 8(a)(5) where a comprehensive description of the profit-sharing plan was prominently displayed by the Employer on its premises and a copy made by the Union?

(b) Where information is demanded by the Union must it be furnished in a form specified by the Union?

VII. Are the findings and order of the Board and the decision of the Court of Appeals in direct conflict with the decisions of the Court, the Board, the National Labor Relations Act and in other respects contrary to the law?

Statutes Involved

National Labor Relations Act as Amended

FINDINGS AND POLICIES

SEC. 1. * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * *

DEFINITIONS

* * *

Sec. 2(9). The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * *

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Sec. 8(c). The expressing of any views, arguments or opinion or the dissemination thereof, whether in written, printed or graphic or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * *

8(d). * * * That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

10(c). * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

SUITS BY OR AGAINST LABOR ORGANIZATION

SEC. 301(a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. * * *

* * *

Section 101.8. STATEMENT OF PROCEDURE * * *. The complaint which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. * * *."

INCOME TAX REGULATIONS UNDER THE 1954 CODE

Information to be Furnished by Employer Claiming Deduction

Sec. 1.404(a).

"(2) A statement describing the plan . . . date when comprehensive detailed description of plan . . . were made available to employees generally, * * *.

* * *

(iv) The basis or formula for determining the amount of each type of benefit and the requirements for obtaining such benefits and the vesting condition."

Statement

A collective bargaining contract was entered into between Petitioner herein and Local 1 for a Unit of the Waiters, Waitresses and Busboys.*

At the very beginning of negotiations, Employer rejected the Union's proposal to include in the contract a clause for continuance of "existing benefits and privileges" which clearly included bonuses and profit-sharing plan (B. A. 29).

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* Elections were held for three separate units on April 29, 1960. Local 1, the charging party, representing a unit of waiters, waitresses, and busboys, won the election with votes of 84 for and 36 against the Union (B. A. 15 footnote).

All prior collective bargaining negotiations with Local 1 were merged into a written three-year contract on October 14, 1960 which is in full force and effect. It is complete, specific and precise on its face and embodies all the terms and conditions of employment which the parties are not free to ignore (B. A. 263-278). By the contract, Local 1 obtained substantial benefits to itself in the form of a "Union Shop" (B. A. 265) and substantial benefits for its members in the form of retroactive pay to June 7, 1960, increases in wages for 1960, 1961 and 1962, more holidays, less hours (B. A. 16, 267-269) and contributions to the Local 1 Welfare Fund and to the Local 1 Pension Fund. Employer is presently contributing to both funds (B. A. 274-275).

The Union acquiesced to the exclusion of this clause from the contract in favor of substantial benefits including a Union Welfare Plan and a Union Pension Plan.

In the negotiations leading to the execution of this contract, the parties agreed that the Petitioner herein would make amendments to its profit-sharing plan, subject to the approval of the Treasury Department, which would eliminate Unit employees as participants therein and pay out to them their "vested interests" in the plan, and further the Unit employees would be protected thereafter with a Union Pension Plan (B. A. 33).

As a result of these negotiations, the contract excludes the profit-sharing plan, but it does provide for coverage with the Union's Pension Plan. The contract excludes bonuses but it does provide for other substantial benefits including Union's Welfare Plan and a "Union Shop".*

Since the signing of the contract on October 14, 1960, the Employer enforced the "Union Shop" clause and 100% Unit employees are members of Local 1.

To promote industrial peace and to prevent strikes which would burden commerce, the contract provides for "no strikes or lockouts as to any dispute arising during the term of this Agreement", and it provides for "grievance and

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* The Board found that two waivers may be inferred: (1) that "Respondent (Employer) was free of any contractual obligation to maintain bonuses for the duration of the contract because during negotiations the Union proposed a clause for continuance of "existing benefits and privileges" which clearly included bonuses and so-called profit-sharing plans and "that clause was not accepted by Respondent (Employer) and is not a part of the contract" (B. A. 29); and (2) that what the "Union waived by its agreement with Respondent (Employer) was the right to have the employees continue as participants in the profit-sharing plan" (B. A. 39).

The Board also found that prior to the signing of the contract, the Employer had paid a quarterly bonus until 1952 or 1953 and then paid two bonuses. "However on occasions the percentages would vary dependent upon the total amount the Employer allowed for bonus payments" (B. A. 17).

arbitration" procedure as to "any dispute arising out of the interpretation or application of the agreement" (B. A. 272-273). The Union, however, has never attempted to use this arbitration procedure to resolve any of its alleged grievances.

The Employer contends that the Union acquiesced in the action taken by it in amending the plan. This is buttressed by the testimony of Zucca, the Union's Secretary, as follows:

> "A. The company said that they would have to get approval from the Treasury Department, because any change in the profit-sharing plan had to be made with the approval of the Treasury Department.
>
> Q. Can you recall any other discussion at that initial meeting?
>
> A. The discussion is that we said that we would have no objection to that, because we were familiar with these things. It is in our own plan. If you want to make changes, you have to have approval from the Treasury Department, so we said it would be all right." (B. A. 95)

As agreed between the parties (B. A. 32-33), the Employer made the amendments* which the Treasury Department approved, and paid out to the Unit employees their "vested interests" in full satisfaction of such interests in the profit-sharing plan as provided for in the amendment (General Counsel's Exhibit 3B; B. A. 262).

There never was any agreement to pay Unit employees 100% of the credits in the plan as though they had remained participants until the normal date of distribution.

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* The right to amend the plan at any time to any extent and in any respect is reserved to the Employer in its own profit-sharing plan and trust agreement (Article X, Section 1; B. A. 248).

The Union knew that the Unit employees would receive less than 100% of their credits and that the differential between the vested interest and 100% of the credits would be forfeited and allocated to other employees who remained participants in the plan. They also knew that the same schedule was used for all employees entitled to a vested interest, including those who voluntarily leave the employ (B. A. 36, 37).

The National Labor Relations Board in its final order directed the Employer to do the following:

> (1) pay bonuses to Unit employees not provided for in the contract;
>
> (2) amend its own profit-sharing plan;
>
> (3) reinstate Unit employees therein;
>
> (4) establish accounts for them;
>
> (5) grant them 100% of their credits as though they had been participants until the normal date of distribution; and
>
> (6) perform other acts with respect to the plan without the consent of the Employer, without the approval of the United States Treasury Department and without any provision therefor in the collective bargaining contract.

The Board charged the Petitioner with unfair labor practice for failing to furnish the Union with a copy of its profit-sharing plan, when evidence shows that a comprehensive description of the plan was prominently displayed in company's office and a copy was made by the Union's representative and the provisions of this plan were explained to employees many times (R. A. 12a, 13a). The contract did not provide for the furnishing of a copy of the plan or amendments to the Union, and the complaint did not allege that there was an agreement to furnish such copies to the Union. It merely alleged that a request was made for the

copies on March 17, 1961, five months after the signing of the contract (complaint paragraphs 16, 17; R. A. 58a).

The comprehensive description and the profit-sharing plan contain the schedule* of how the interest of an employee (Union or non-Union) vests (Article VII, Section 4c; B. A. 243, 311) as required by the Internal Revenue Code, Section 1.404(a)(2)(iv) (*supra* page 8), and the same schedule is used for all employees who are entitled to a "vested interest".

On November 1, 1960, two weeks after the collective bargaining contract was signed, the understanding between the parties with respect to the profit-sharing plan was reported and set forth in the Minutes of the Director's Meeting. An amendment was adopted eliminating the Unit employees as participants "effective as of the Plan's current fiscal year" which was August 1, 1960 (B. A. 260). Computations for the vested interests were dependent upon the years of participation in the Government approved plan, effective August 1, 1955 (B. A. 261).

On February 17, 1961, prior to the actual distribution of the "vested interests", the Employer amended the Plan further by making the computations in the schedule dependent upon the "Participants' completed years of service with the Company following August 1, 1947" (R. A. 52a; General Counsel's Exhibit 13).

This amendment clearly increased the vested interests of Unit employees. The computation and payments were made in accordance with this amendment regardless of any inconsistent or confusing statement in the Minutes of No-

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* Description of the profit-sharing plan clearly sets forth how the interest vests in employees as follows:

> "After five years of participation 50% of your share is vested in you and your share will continue to vest at the rate of 5%, each year thereafter, so that for example after ten years of participation 75% is vested. After fifteen years it is 100% vested." (B. A. 311)

vember 1, 1960. Unit employees' interests were computed according to the years of service following August 1, 1947 up to August 1, 1960, the effective date of the amendment. They did not receive less. The intention of the Employer was clear from the reading of the Minutes and both amendments and from the actual payments made to the Unit employees. No one was paid as though he voluntarily left the employ on the date he became a member of the Union.

The Minutes and amendments were offered by the Board and received in evidence without any reservations. The amendment of February 17, 1961 was not attacked or impeached by the Board and no findings were made with respect to this amendment.

The Board, in making its findings, relied on conversations, statements and proposals which were made prior to the signing of the collective bargaining contract, which tended to vary the terms of the collective bargaining contract and should not have been received in evidence. It also relied on statements and inferences not supported by allegations in the complaint.

No employee was discharged, no employee had to be reinstated, no back pay was due, no election campaign, organization or other activities took place on the dates when the complaint alleged the Employer engaged in the purported unfair labor practices.

In substance, the complaint alleges that the Employer paid a bonus to non-Unit employees on December 7, 1960 and refused to pay a bonus to Unit employees. It alleges the Employer unilaterally amended its profit-sharing plan and is denying benefits to Unit employees because they joined and assisted the Union, in violation of Sections 8(a)(1)(3)(5) of the Act (Complaint, paragraphs 13, 14, 15, 18, 19; R. A. 54a, 60a).

The Employer by its answer, denied the substantive allegations of the complaint and by its affirmative defenses alleged lack of jurisdiction of the subject matter and that

the charges did not constitute a labor dispute within the meaning of the Act" (Answer para. "Second", Appendix E, *infra* page 18). This was also urged in its motions during and after the hearing (Motion dated August 14, 1961, paragraph "Seventh"; R. A. 36a, 43a). It specifically excepted to Section IV of the Intermediate Report which set forth that the activities of Employer tended to lead to labor disputes burdening and obstructing commerce (Exception, page 50).

Notwithstanding the above the Court of Appeals rendered its decision as follows:

> "The National Labor Relations Board found that Toffenetti Restaurant Company, Inc., violated the National Labor Relations Act, sec. 8(a)(1, 3), 29 U.S.C. sec. 158(a)(1, 3), by discontinuing bonus payments to those of its employees who were represented by the union, by disqualifying union members from participation in its profit-sharing plan, and by liquidating the interests of union-represented employees in the profit-sharing plan in a discriminatory manner. The Board also found that respondent violated sec. 8(1, 5), 29 U.S.C. sec. 158(a)(1, 5), by unilateral effectuation of these discriminatory policies and by refusing to furnish the union, upon its request, with a copy of the profit-sharing plan and its amendment. 136 NLRB no. 106. These findings are amply supported by the record."

REASONS FOR GRANTING THIS WRIT

I

The effect of the decision and order is to create new contracts, not contemplated by the parties and the Board lacks jurisdiction to abrogate, modify or supplement a collective bargaining contract and profit-sharing plan.

The Decision impairs the obligation of said contracts which are contrary to the principles in the decision of *Trustees of Dartmouth College* v. *Woodward*, cited in 4 Wheat. 518.

Section 8(d) of the Act in material part, provides:

> "* * * Where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract * * *".

In Sec. 8(d) of the National Labor Relations Act, as amended by the 1947 Act, 29 U.S.C. Sec. 158(d), Congress indeed provided that where there was a collective agreement for a fixed term the duty to bargain did not require either party "to discuss or agree to any modification of the terms and conditions contained in" the contract. (*Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332.)

In the humble opinion of counsel for Employer the Board lacked jurisdiction to grant the order which in substance directs Employer to cease and desist from:

> (a) Unilaterally changing its profit-sharing plan although it did this with the Government's approval, the Union's consent; and the right to amend at any time, to any extent and in any respect is reserved to the Company by Article X, Section 1 (B. A. 248);

(b) Unilaterally changing the August or December bonuses or other conditions of employment although same were eliminated from the contract by consent and waiver of the Union;

(c) Discouraging Union membership by disqualifying Unit employees from participation in the profit-sharing plan although such disqualification was agreed and consented to by the Union and 100% of the Unit employees still remain members of Local 1;

(d) Failing to furnish the Union with a copy of the Toffenetti Fifteen Year profit-sharing plan and amendment where the contract did not provide for same, and a comprehensive description of the plan hung on the Employer's bulletin board and the Union made a copy of same;

and it lacked jurisdiction which in substance directs the Employer to take affirmative action as follows:

(a) Make available to the Union the profit-sharing plan and amendments not provided for in the contract;

(b) Amend the plan to eliminate non-Union membership as a requirement for eligibility and eliminate the purported discriminatory distribution provision when there are no such discriminatory requirements or provisions in the plan or amendments and non-Union and Union members, outside Local 1, still are participants and distribution payments are the same for all employees who are entitled to a vested interest;

(c) Establish accounts for Unit employees in the profit-sharing plan and granting them the differential between their vested interest and 100% of their credits, thus making them once again participants by abrogating the agreement to eliminate participation, without the approval of the United States Treasury De-

partment and in effect using its facilities as a collection agency;

(d) Make whole Unit employees for non-payment of the Christmas bonus of 1960 although same is not provided for in the written bargaining contract, thus creating additional burdens in violation of the due process clause of the United States Constitution;

(e) Bargain collectively with the Union regarding the accounts restored in the plan although collective bargaining has terminated with the execution of the contract;

(f) Make available for examination and copy, all payroll records, Social Security records, time cards, profit-sharing plan records, and other records necessary to analyze the amounts paid or restored to the plan accounts although not provided for in the contract (B. A. 4, 5).

In *National Labor Relations Board* v. *American Ins. Co.*, 343 U. S. 395, the Court held at page 404:

> "* * * and it is equally clear that the Board may not either directly or indirectly compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements".

In *Refinery Employees Union etc.* v. *Continental Oil Company* (U. S. D. C., W. D. Louisiana, April 21, 1958), 160 F. Supp. 723, the Court held at page 730:

> "* * * (1) Courts give legal effects to contracts as written. * * * (4) Courts cannot make contracts for parties. * * *."

At page 733:

> "Our duty when called upon to do so, is to enforce collective bargaining agreements on behalf of or against labor Unions as they are written."

It is Employer's contention that there is no legal precept of law or legislation whereby a Labor Board can impose new contractual obligations on an employer without its consent.

The Board is wholly without jurisdiction to legislate, create, impair or abrogate the terms of a written collective bargaining contract and profit-sharing plan, and superimpose or substitute its own new terms and conditions under the guise of correcting unfair labor practice or effectuating the policies of the Act. Contractual relationship should remain inviolate and sacred. This is an integral part of our American way of life guaranteed under Constitutional Government. A contract impressed administratively upon any Employer would be arbitrary, capricious, unconscionable and give rise only to a totalitarian form of government.

It contends further that Congressional Act created the right to institute a profit-sharing plan under the Internal Revenue Code. It is to be administered by the Treasury Department and the Board should not be permitted, under the guise of remedying unfair labor practices, to usurp the functions of the Treasury Department and Congress of the United States. The Board does not have jurisdiction to pass upon the legality or substantive terms of a profit-sharing plan and amendments approved by the Treasury Department. It may not alter or regulate such profit-sharing plan by its unilateral imposition of new terms, without the approval of the Employer and the Treasury Department.

The Court held in similar cases that the Board may not modify or supplement written contracts under the guise of remedying unfair labor practices. *N. L. R. B.* v. *Nash-Finch*, 211 F. 2d 622; *Intermountain Equipment Co.* v. *N. L. R. B.*, 239 F. 2d 480; *Anheuser-Busch*, 112 N. L. R. B. 686; *Speidel Corp.*, 120 N. L. R. B. 733.

II

The proceeding before the Board is not valid because the Board lacks jurisdiction of the subject matter and the remedies do not effectuate the policies of the Act.

There was no Labor dispute within the meaning of the Act.

Section 2(9) of the Act defines a dispute as any controversy concerning the terms, tenure and conditions of employment.

The negotiations resulted in a complete contract covering all conditions of employment including a "Union Shop" clause. 100% of all Unit employees are members of the Union as testified to by the Union's Secretary Mr. Zucca (R. A. 20a).

The Collective bargaining contract provided for "no strike or lockouts as to any dispute which may arise" and for "grievance and arbitration" procedure (B. A. 272-273).

Complete effectuation of the policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the "quid pro quo" for the agreement not to strike. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 455.

In *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, at pages 577 and 578:

> "We held in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, that a grievance arbitration provision in a collective agreement could be enforced by reason of § 301(a) of the Labor Management Relations Act and that the policy to be applied in enforcing this type of arbitration was that reflected in our national labor laws. Id., at 456-457. The present federal policy is to

promote industrial stabilization through the collective bargaining agreement. Id., at 453-454. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."

* * *

"Here arbitration is the substitute for industrial strife. * * * For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.

At page 583:

"When, however, an absolute no-strike clause is included in the agreement, then in a very real sense everything that management does is subject to the agreement, for either management is prohibited or limited in the action it takes, or if not, it is protected from interference by strikes."

The affirmative remedies for unfair labor practices are provided for in Section 10(c) of the Act and must effectuate the policies of the Act.

Section 1 of the Act defines the policies of the Act which in substance are to organize, bargain collectively and prevent labor disputes from burdening and obstructing commerce.

Assuming there was a dispute arising out of the interpretation or application of the agreement, then the duty to bargain about it was through the "grievance and arbitration procedure" provided for in the contract, article XII (B. A. 272). The Union's failure to do so did not require the Employer to bargain independently and a refusal to do so could not constitute an unfair labor practice within the meaning of the Act.

Employer contends that even if collateral oral agreements in the enforceable sense were intended, the duty to bargain

about them should also be channeled by the Union through the "grievance and arbitration procedure" provided for in the contract.

In any event, under the terms of the contract, no strike could result as to any dispute arising during the term of the agreement (B. A. 273). Because of the "no strike" clause no dispute could obstruct commerce. The charges complained of in this case did not constitute a labor dispute within the meaning of the Act and they were not such as were protected by the Act. The National Labor Relations Act does not provide remedies or relief for such charges which are not protected by the Act.

If the Employer violated any of the provisions in the contract the Union could seek relief in the courts or by judicial proceeding based on purported breach of contract or by way of declaratory judgment.

In *National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395, at page 401:

> "*First.* 'The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively."

At page 404:

> "As amended in the Senate and passed as the Taft-Hartley Act, the good faith test of bargaining was retained and written into Section 8(d) of the Na-

tional Labor Relations Act. That Section contains the express provision that the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.

And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.

In the case of *National Labor Relations Board v. Standard Oil Co.*, 196 Fed. Rep. 2nd Series (U. S. C. A. 6th Cir., June 6, 1952), the Court held at p. 894:

"The Company petitioned to have the order set aside contending that it was not an unfair labor practice for an employer with a bargaining agreement with his employees, which contained provisions for adjustment of grievances, to stand upon the terms of the bargain and demand that grievances be handled within the framework of the contract. The Board contended that there was a continuous statutory obligation to bargain which existed independently of all contractual obligations. This Court held that though the duty to bargain is absolute, it may be channeled and directed by contractual agreement; that we knew of no mandate of the law that required bargaining to be undertaken and pursued in a particularized manner excluding every other; and that under the contract between the parties their differences were to be resolved in the manner therein outlined. After reviewing the purposes of the Act, we stated 'Our conclusion is that the petitioner did not commit any unfair labor practice; that its effort to channel collective bargaining within the provisions of a contract with the union, was not a refusal to bargain; * * *.' We granted the petition to set aside the Board's order."

III

The purported discriminatory acts or disparate payments did not and could not discourage membership in the Union and are not violative of Section 8(a)(3) of the Act.

Section 8(a)(3) provides:

> "* * * by discrimination in regard to hire or tenure of employment or any terms or conditions of employment to encourage or discourage membership in a labor organization."

It is evident that disparity treatment is not of itself evidence of anti-Union motivation to discourage Union membership and discriminatory acts alone do not constitute violation of Section 8(a)(3) of the Act.

Section 8(a)(3) provides that only such discriminatory acts which encourage or discourage Union membership is a violation.

In the present case the contract provides for a "Union Shop" clause. 100% of all employees in the Unit are members of Local 1. After the election the Employer told 36 employees who voted against the Union to sign up with the Union (R. A. 33a) and this provision has been faithfully enforced for more than two years.

That none of the purported charges tended to or did discourage membership in any Union is evidenced by the later election of Local 89 for a Unit of kitchen employees in October 1961 which it won, and the election of Local 15 for a Unit of bartenders in December 1962 which the Union also won.*

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* The collective bargain contract with Local 89 does not provide for contributions to Union pension or welfare plans and its members remain participants in the Employer's profit-sharing plan which is still in effect.

It has been held that payment of a bonus or disparate payment to a group outside the scope of the Unit does not constitute such discrimination as is violative of the Act.

Employer respectfully cites *Anheuser-Busch*, 112 N. L. R. B. 686, *Intermountain Equip.* v. *N. L. R. B.*, 239 F. 2d 480; *Speidel Corp.*, 120 N. L. R. B. 733; *N. L. R. B.* v. *Nash-Finch*, 211 F. 2d 622, in support of its contention.

IV

Contrary to law, Board's findings were based on conversations and acts made prior to the signing of the collective bargaining contract, unreasonable and inconsistent inferences, no allegations in the complaint, and no provisions in the contract to sustain the findings.

In *Ford* v. *Luria Steel, etc.*, 192 F. 2d 880, the Court held at page 884:

> "* * * in other words the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced in writing is incompetent * * *."

In *Association of Professional Engineering Personnel* v. *Radio Corp. of America* (U. S. D. C., N. J. May 5, 1960), 183 F. Supp. 834, the Court held at page 838:

> "It has become elementary when parties have merged all prior negotiations and agreements in a writing intending to make that the repository of their final understanding, and such writing clearly demonstrates the intentions of the parties, evidence of prior negotiations and agreements tending to vary the terms of such writing will not be received."

The Board based its findings of violation of Section 8(a)(1, 3, 5) of the Act upon testimony that, during negotiations, Employer's former attorney, Mr. Carb, said, "in the future should business warrant it, bonuses would be given to all employees" (B. A. 18). The Board found this statement negates any inference that the Union waived bonuses or the right to bargain about bonuses.

There can be no question that this testimony tended to substitute and supplement new terms of the contract and was incompetent evidence upon which to base findings of violation of Section 8(a)(1, 3, 5). All prior negotiations were merged in a written contract.

There is no allegation in the complaint alleging this declaration by Mr. Carb or that it was intended as an agreement in the enforceable sense.

Assuming arguendo that these statements of Employer's former attorney Mr. Carb, during negotiations, constituted a collateral oral agreement in the enforceable sense, which Employer denies, then the duty to bargain about it should have been channeled by the Union through the Grievance and Arbitration procedure provided for in Article XII (B. A. 272), and the Union's failure to do so did not require the Employer to bargain independently with respect to the terms of a collateral oral agreement and such refusal could not constitute an unfair labor practice or refusal to bargain within the meaning of the Act (*N. L. R. B.* v. *Standard Oil Co.*, 196 F. 2d at 894).

The Board based its findings of inference of hostility on statements in old election campaign letters written approximately 9 months prior to the filing of the charges, and many months prior to the signing of the contract (B. A. 282-306). None of the letters contained any threat of reprisal or force or promise of benefit, and they are not admissible as evidence of unfair labor practice under Section 8(c) of the Act.

The Employer objected to the admission of these election campaign letters and statements attributed to Mr. Toffenetti, on the ground that they were protected freedom of speech within the meaning of Section 8(c) of the Act. There were no objections filed to the conduct of the Apr. 29, 1960 elections and no unfair labor charges were filed relating to these letters. The letters should not have been received in evidence (Section 8(c), *supra*, p. 6).

In *N. L. R. B.* v. *Superior Oil Co., Inc.*, 199 F. 2d 39, at page 43 the Court held:

> "We do not believe anti-Union motivation contrary to the provisions of the Act can be based upon conduct which the Act recognizes as permissible * * *."

The Board based its findings on testimony that, during negotiations, the Employer agreed to permit verification of distribution payments and to furnish a copy of the profit-sharing plan.* There are no allegations in the complaint and no provisions in the contract with respect to verification or furnishing of the plan. The complaint merely refers to a request made on March 17, 1961 to furnish a copy of the plan five months after the signing of the contract (Complaint par. 16, R. A. 58a).

Inferences cannot be said to be reasonable when they are based on no allegations in the complaint, no provisions in the contract, lack of proof on the part of Employer, inconsistent inferences, conversations and statements made during negoti-

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* Although the contract does not provide for verification, the distribution checks were verified by the Union representatives, Mr. Pola and Mr. Dagger, about two months prior to actual payment and neither of them "raised any objection to the proposed payment of less than 100%" of their credits (R. A. 24a, 27a, 33a, 34a; B. A. 36, 37).

The Employer's bookkeeper testified that Pola said the Employer's method of computation was the same as the Union's method (R. A. 28a, 29a). She testified that the same method of computation was used for all employees (R. A. 26a, 27a).

ations which were merged into a written collective bargaining contract.

The entire case was based on such procedure.

Section 101.8 of the Statement of Procedure of the Act provides that the complaint should set forth facts upon which the Board bases its jurisdiction and facts relating to alleged violation of law (*supra*, page 7).

The complaint (R. A. 54a-60a) failed to allege the following purported charges upon which the Board based its findings:

(a) There is no allegation in the complaint that it was agreed between the parties that bonuses would be paid to Unit employees when bonuses were paid to non-Unit employees.

(b) There is no allegation in the complaint that it was agreed that bonuses would be paid should business warrant it or that any request was made to bargain concerning bonuses because business warranted payment.

(c) There is no allegation in the complaint that it was agreed that no bonuses or raises would be paid to non-Unit employees which would exceed the benefits paid to Unit employees.

(d) There is no allegation in the complaint that the copy of the profit sharing plan and amendments were requested during negotiations or prior to March 17, 1961, and that Employer agreed to furnish same.

(e) There is no allegation which states that benefits were guaranteed.

(f) There is no allegation in the complaint that the distribution payments were to be verified by the Union and that same was refused, and there is no provision in the contract requiring verification.

(g) There is no allegation that it was agreed that the Unit employees would receive 100% of their credits in the plan, or more than their vested interests.

(h) There is no allegation that the amendment of February 17, 1961 was unilaterally made or that the Union did not consent to same or that it contains discriminatory provisions.

V

The Board based its findings of violation of Section 8(a)(3) upon the purported failure of Employer to show lack of discrimination when the burden of proof was at all times on the Board to show discrimination to discourage Union membership.

In *Interlake Iron Corp.* v. *N. L. R. B.*, 131 F. 2d 129, at page 134, the Court held:

> "* * * the Company does not have to prove non-discrimination because of Union activities the Board must prove discrimination thereof."

That the burden of proof is at all times on the Board is supported by the following cases:

Indiana Metal Products Corp. v. *N. L. R. B.*, 202 F. 2d 613;
N. L. R. B. v. *McGahey*, 233 F. 2d 406;
Anheuser-Busch, 112 N. L. R. B. 686;
N. L. R. B. v. *Winter Garden Citrus Cooperative*, 290 F. 2d 913.

Section 8(a)(3) provides that the discriminatory acts as encourage or discourage membership in the Union constitute a violation.

The Trial Examiner found an inference "most favorable to General Counsel" because of the purported lack of explanation by Toffenetti or his witness of his motivation for purported disparity treatment and he found an inference that the bonus payment to non-Unit employees was motivated by anti-Union considerations because of the absence of factual basis for Mr. Toffenetti's statement, "Well, it was after all more or less to equalize the pay" with represented employees (R. A. 45a, 46a).

In *N. L. R. B.* v. *Winter Garden Citrus Cooperative*, 290 F. 2d 913, the Court held at page 916:

> "It is not and never has been the law that the Board may recover upon failure of respondent to make proof. The burden is on the Board throughout to prove its allegations and this burden never shifts."

During the hearing the Trial Examiner held:

> "Absent some explanation, reasonable explanation by the Respondent, for this disparity treatment, I must draw inferences unfavorable to the Respondent" (R. A. 45a).

It has been held that the payment of a bonus or a disparate payment to a group outside the scope of the unit does not constitute such discrimination as is violative of the Act.

In support of its contention, Employer respectfully cites the case of *Anheuser-Busch*, 112 N. L. R. B. 686; *Intermountain Equipment Co.* v. *N. L. R. B.*, 239 F. 2d 480 (C. A. 9); *Speidel Corporation*, 120 N. L. R. B. 733; *National Labor Relations Board* v. *Nash-Finch Co.*, 211 F. 2d 622.

In the *Anheuser-Busch* case, it was held at page 690:

> "* * * the statutory scheme did not contemplate that disparate payment among employees in different sep-

arate units along unit lines would by itself give rise to a finding of discrimination. To hold otherwise would create a wholly unrealistic requirement that would impose intolerable conditions on an employer who had concurrent bargaining relationships with separate bargaining agents. * * * would render any attempt at inferring discriminatory motivation both speculative and futile."

In the case of *Indiana Metal Products Corp.* v. *National Labor Relations Board*, 202 F. 2d 613, the Court held at page 616:

"* * * The burden was on the General Counsel of the Board to prove affirmatively, by substantial evidence, that Meyer's discharge was due to union activities. N. L. R. B. v. Reynolds International Pen Co., 7 Cir., 162 F.2d 680, 690; Interlake Iron Corp. v. N. L. R. B., 7 Cir., 131 F. 2d 129, 134. In the latter case, this Court, in an opinion by Judge Minton, said, 'The company does not have to prove nondiscrimination because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board. (Citing)'"

In the case of *National Labor Relations Board* v. *T. A. McGahey, Sr.*, 233 F. 2d, 406, the court held at page 410:

"* * * The finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired. Indeed, we have frequently sustained 8(a)(1) charges while rejecting those under 8(a)(3), N. L. R. B. v. Riverside Mfg. Co., *supra*; * * *."

And at page 413:

> "* * * The employer does not enter the fray with the burden of explanation. * * * An unlawful purpose is not lightly to be inferred."

In the case of *Interlake Iron Corp.* v. *National Labor Relations Board*, 131 F. 2d 129 (C. C. A. 7th Cir., 1942), the court held at page 134:

> "This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board. National Labor Relation Board v. Union Manufacturing Co., 5 Cir., 124 F. 2d 332, 333; Hazel-Atlas Glass Company v. National Labor Relations Board, 4 Cir., 127 F. 2d 109."

At pages 133 and 134:

> "We recognize the right, the exclusive right, of the Board to draw reasonable inferences from the facts found. * * * But an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and cannot be considered as substantial evidence."
>
> * * *
>
> "The Board cannot shift the burden of proof or impose what it chooses to call the duty of the company to go forward with the evidence by showing the system of merit rating used in facilitating a layoff is subject to discrimination, and that the company and its supervisors who employed the merit rating system are hostile to the union, and then require the company to prove to the Board's satisfaction that each employee upon whom the system was used was not only treated fairly in the rating but that he was not discriminated against because of his union activities.

VI

Board found refusal to bargain because the Union was not furnished exact copy of the Employer's profit-sharing plan although the copy of the description of the plan was made by the Union.

The Union had access to and actually had a copy of a comprehensive description of the profit-sharing plan which hung on Respondent's bulletin board for many years (Charging Parties Exhibit 1, B. A. 307-312). Employer contends that information does not have to be in the same form as requested. The Union's Secretary Zucca testified as follows:

> "Trial Examiner: Insofar as the plan was not going to be used as a basis for further coverage of the employees, what necessity did you have for the plan other than to find out what the employees were going to be paid?
>
> The Witness: Well, primarily that's what we wanted to find out, what the employees were going to get. This was a main issue because—
>
> Trial Examiner: Did you need it for any other purpose?
>
> The Witness: Not that I know of." (B. A. 97)

In the *Cincinnati Steel Casting Company* and *International Union, etc.*, case, 86 N. L. R. B. 592, 593, at page 593, the Board stated:

> "* * * However, we have not held, nor do we not hold, that the Employer is obligated to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining."

Inasmuch as the contract did not provide for the furnishing of a copy of the plan to the Union and it was not to be used as a basis for further coverage and the Union was only interested in the provisions with respect to distribution, there would appear to be no reason to give the Union a copy of the whole plan. The description of the plan did contain the schedule of the manner and rate of vesting. This was in possession of the Union. Under the Internal Revenue Code the employees are only entitled to a prominent display of a description of the plan (*supra*, page 8). This was done and the Employer should not be required to do more. Since the employees are no longer covered by the plan and the amendments, the contents of such plan are a matter of private concern.

VII

The order of the Board and the decision of the United States Court of Appeals are contrary to the decisions of the Courts and the National Labor Relations Board, the National Labor Relations Act and in other respect contrary to law and fact.

The cases in point holding that similar action by Employer was not an unfair labor practice are: *Speidel Corporation*, 120 N. L. R. B. 733; *National Labor Relations Board* v. *Nash-Finch Co.*, 211 F. 2d 622; *Intermountain Equip. Co.* v. *National Labor Relations Board*, 239 F. 2d 480; *Anheuser-Busch Inc.*, 112 N. L. R. B. 686; *Association of Professional Engineering Personnel* v. *Radio Corp. of America*, 183 F. Supp. 834; *National Labor Relations Board* v. *Standard Oil Co.*, 196 Fed. 2d 894.

In *Speidel Corporation*, 120 N. L. R. B. 733, at page 738 the Board found:

> "* * * the Respondent had rejected a proposed 'Maintenance of Privileges' clause on the ground that

it would make the payment of bonuses a contractual obligation. The Union had not dissented from this view and the contract which was thereafter signed and which was in force when the alleged violation occurred contained neither the 'Maintenance of Privileges' clause nor other provisions requiring the payment of bonuses to tool makers."

And at page 740 the Board found:

"Trial Examiner attached no weight to the respondent's rejection of the Union's proposal during the 1955 negotiations or the Union's apparent acquiescence therein."

At page 741 the Board found:

"In the face of the respondent's bargaining position, the Union's complete silence and its failure thereafter to contradict the respondent's interpretation of the clause, must be taken to mean that the Union acquiesced in the respondent's understanding.

* * *

"The Union's action in 1956 also indicates a continued acquiescence in the respondent's management prerogative position on bonuses."

At page 741:

"Accordingly we think it highly significant that the 1955 contract as eventually signed did not contain the Union's proposed maintenance of privileges clause. Although we will not readily infer a waiver of statutory bargaining rights, we find here, based on the entire record, that there was a clear understanding between the parties that the subject of bonuses would remain a management prerogative. In the circumstances we therefore find that in the course of the

1955 contract negotiations the Union bargained away or waived its interest in the matter of bonuses."

In *National Labor Relations Board* v. *Nash-Finch Co.* (U. S. Ct. of Apps., 8th Cir., April 13, 1954), 211 F. 2d 622, the facts were similar to the present case.

At page 624:

"It had been customary for the respondent to maintain hospitalization insurance and to contribute toward the maintenance of group life insurance for all the employees at its Fargo plant, as well as to pay them a Christmas bonus. * * * "

At page 625:

"The respondent and the Union bound themselves by the agreement to abide by its terms and provisions. * * *. It contained no provision requiring the Respondent to maintain insurance or provide a Christmas bonus for the employees represented by the Union. * * *. It paid no 1951 Christmas bonus for such employees. Hospital and group insurance benefits and Christmas bonuses were not discontinued as to the respondent's non-union employees at Fargo."

The Court held at pages 626, 627:

"The following language from *Printing &c. Co.* v. *Sampson*, L. R. 19 Eq. 462, 465, has several times been approved by the Supreme Court of the United States: '* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.' See *Baltimore & Ohio S. W. R.* v. *Voigt*, 176 U. S. 498, 505, 20 S. Ct.

385, 387, 44 L. Ed. 560; *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, 356, 51 S. Ct. 476, 75 L. Ed. 1112.

The respondent, we think may not be convicted of an unfair labor practice for doing no more and no less for its union employees than its collective bargaining agreement with them called for. 'And it is * * * clear that the Board may not, either directly or indirectly, compel concessions or to otherwise 'sit in judgment upon the substantive terms of collective bargaining agreements.' *National Labor Relations Board* v. *American National Insurance Co.*, 343 U. S. 395, 404, 72 S. Ct. 824, 829, 96 L. Ed. 1027. Whether the contract in suit should have contained the clause proposed by the Union requiring the maintenance of existing standards of employment, was 'an issue for determination across the bargaining table and not by the Board.' At page 400 of 343 U. S. at page 832 of 72 S. Ct."

"* * * It seems to us what the Board has done under the guise of remedying unfair labor practice is to attempt to bestow upon the respondent's Union employees the benefits it believes the Union should have obtained but failed to obtain for them as a result of its collective bargaining with respondent on their behalf."

In the case of *Intermountain Equip. Co.* v. *National Labor Rel. Bd.*, 239 F. 2d 480, at page 481:

"The union did not press for a bonus provision because of what it interpreted as an assurance from Dufford, that if bonuses were paid there would be no discrimination between union members and other workers outside the bargaining unit.

After the contract was signed at the end of July, 1953, the Company installed time clocks for union

members only and paid them only for work time shown on the clock. The result was that union employees did not receive any sick leave. In December, 1953, the Company, without notifying the union, paid bonuses to employees not in the bargaining unit, but denied them to members of the bargaining unit. In January, 1954, the union filed a complaint against the Company with the Board.

The issue is whether by denying sick leave to members of the bargaining unit of the union during the period of the 1953 contract, and by paying bonuses in December, 1953, to all employees except members of the bargaining unit, the Company committed an unfair labor practice under Section 8(a)(3)."

At page 482:

"The trial examiner found 'that no collateral oral agreement, in the legally enforceable sense, was in fact intended or made.'"

At page 483:

"It should be noted that under the statute mere discrimination among employees is not an unfair labor practice; it is only where the discrimination encourages or discourages union membership that an unfair labor practice occurs. While such a purpose on the part of the employer may be inferred from the circumstances the only circumstance here tending to show such discrimination is the denial of certain benefits which the union had not bargained for on behalf of the members of its bargaining unit. As pointed out above, the cases cited by the Board do not support the conclusion that on the facts of this case, discrimination having the purpose of effect of discouraging union membership is shown. To the contrary, as suggested by the Chairman of the Board in his dissenting

opinion, that the employer here acted from no anti-union motivation is shown by the substantial benefits obtained by the union under the contract for itself in the form of the union security provision and for its members in a wage increase, paid holidays and other benefits."

In *Anheuser-Busch*, 112 N. L. R. B. 686, at page 687:

"On January 15, 1954, Respondent decided to reimburse all employees represented by Local 6 in the Unit for which it was bargaining representative, for the day of November 27 not worked. On January 24, 1954, such payment in the sum of $18,299.76 was made. Although importuned by Local 187, Respondent refused to pay employees represented by Local 187 in its bargaining Unit for Friday not worked on the ground that payment to Local 6 members was for the purpose of making up for earlier failure to observe its traditional practice with Local 6 of giving timely notice of an impending shutdown."

* * *

At page 700:

"Respondent's president told them that the entire plant would be closed and that no one would be paid who did not work."

At page 687:

"We agree with the Trial Examiner that the determination of the Section 8(a)(3) allegation of the complaint depends on whether, under the principles established by the Supreme Court in the *Radio Officers' Union*, the *Teamsters*, and *Gaynor News* cases (decided together in 347 U. S. 17), discriminatory motivation within the meaning of the Act existed in the circumstances of this case which would support an unfair labor practice finding.

"The Supreme Court stated:

> 'The language of Section 8(a)(3) is not ambiguous. The unfair Labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus the Section does not outlaw all encouragement or discouragement of membership in Labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this Section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a Labor organization is proscribed.'"

* * *

At page 690:

"In the situation with which we are here confronted, the disparity of treatment stems from the grant of an economic benefit to employees in a separate bargaining unit, represented by its own bargaining representative without according the same treatment to employees in another separate bargaining unit represented by another representative. That the Act was so designed as to afford groups of employees of an employer the utmost freedom in their choice of a bargaining representative by permitting them to select such representatives in separate bargaining units, indicates that the Statutory scheme *did not* contemplate that disparate treatment among employees in different separate units along unit lines would by itself give rise to a finding of discrimination. To hold otherwise would create a wholly unrealistic requirement that would impose intolerable conditions on an employer who had concurrent bargaining relationships with separate bargaining agents. * * * would render any attempt at inferring discriminatory motivation both speculative and futile."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

TEITELBAUM & TEITELBAUM,
Counsel for Petitioner,
1482 Broadway,
New York 36, N. Y.

MORRIS TEITELBAUM,
PAULINE TEITELBAUM,
of Counsel.

Dated: February 25, 1963

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 134—October Term, 1962

(Argued November 27, 1962 Decided November 28, 1962)

Docket No. 27674

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOFFENETTI RESTAURANT COMPANY, INC.,

Respondent.

Before:

LUMBARD, *Chief Judge,*
CLARK and KAUFMAN, *Circuit Judges.*

The National Labor Relations Board petitions for enforcement of its order to respondent to cease and desist certain acts found to be unfair labor practices under § 8(a)(1, 3, 5) of the National Labor Relations Act, 29 U. S. C. § 158(a)(1, 3, 5), and to take certain affirmative action to effectuate the policies of the act.

JAMES McC. HARKLESS, Atty., National Labor Relations Board, Washington, D. C. (Stuart Rothman, Gen. Counsel, Dominick L. Manoli, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen. Counsel, and Melvin J. Welles, Atty., National Labor Relations Board, Washington, D. C., on the brief), *for petitioner.*

PAULINE TEITELBAUM, of TEITELBAUM & TEITELBAUM, New York City (Morris Teitelbaum, New York City, on the brief), *for respondent.*

PER CURIAM:

"The National Labor Relations Board found that Toffenetti Restaurant Company, Inc., violated the National Labor Relations Act, § 8(a)(1, 3), 29 U. S. C. § 158(a)(1, 3), by discontinuing bonus payments to those of its employees who were represented by the union, by disqualifying union members from participation in its profit-sharing plan, and by liquidating the interests of union-represented employees in the profit-sharing plan in a discriminatory manner. The Board also found that respondent violated § 8(1, 5), 29 U. S. C. § 158(a)(1, 5), by unilateral effectuation of these discriminatory policies and by refusing to furnish the union, upon its request, with a copy of the profit-sharing plan and its amendment. 136 NLRB No. 106. These findings are amply supported by the record.

The petition for enforcement is granted and the Board's order will be enforced in full."

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOFFENETTI RESTAURANT COMPANY, INC.,

Respondent.

PETITION FOR REHEARING IN BANC

Teitelbaum & Teitelbaum, New York, N. Y., for respondent.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

26 Dec 1962

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 27674

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TOFFENETTI RESTAURANT COMPANY, INC.,

Respondent.

DECREE

Before: Lumbard, Chief Judge, Clark and Kaufman, Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on April 18, 1962. The Court heard argument of respective counsel on November 27, 1962, and has considered the briefs and transcript of record filed in this cause. On November 28, 1962, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Rela-

tions Board in said proceeding be enforced, and that Toffenetti Restaurant Company, Inc., its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

CHARLES E. CLARK
Judge, United States Court of Appeals for the Second Circuit

IRVING R. KAUFMAN
Judge, United States Court of Appeals for the Second Circuit

FILED: January 10, 1963

A true copy,
A. Daniel Fresa
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

v.

TOFFENETTI RESTAURANT COMPANY, INC.,
Respondent.

Motion for stay granted.

C. E. C.
I. R. K.
U. S. C. JJ.

January 10, 1963

APPENDIX E

Amended Answer and Affirmative Defenses

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SECOND REGION

Case No. 2-CA-7874

TOFFENETTI RESTAURANT COMPANY, INC.

and

DINING ROOM EMPLOYEES UNION LOCAL I, HOTEL AND RESTAURANT EMPLOYEES, AND BARTENDERS INTERNATIONAL UNION, AFL-CIO

AMENDED ANSWER

The Respondent, as and for its amended answer, answering the complaint herein, alleges as follows:

First: Denies the allegations of the paragraphs of the complaint marked "5," "6," "7," "8," "9," "10," "11," "12," "13," "14," "15," "16," "17," "18," "19," "20," "21," "22," "23," and "24."

AFFIRMATIVE DEFENSES

FOR FURTHER DEFENSES TO THE CHARGES IN THE COMPLAINT HEREIN, RESPONDENT ALLEGES THE FOLLOWING:

First: The Respondent alleges that the Statute of Limitations (six months) is a bar to the alleged charges in the complaint.

Second: Respondent alleges that the charges in the complaint are not subject to the Board's jurisdiction, in that:

(a) The charges as alleged do not constitute a "labor dispute" within the meaning of the Act. Negotiations resulted in a collective bargaining contract with Dining Room Employees Union Local 1, dated October 14, 1960, which did not provide for the continuance of benefits including Bonuses and the Profit-Sharing Plan.

(b) The charges as alleged are not violative of the policies of the Act.

(c) The charges as alleged do, in effect, constitute an action instituted by the Board for Local 1 as representative of its members against the Employer for money damages thereby using the Board as a collection agency.

(d) The charges as alleged do not interfere with interstate commerce.

Third: Respondent alleges that events leading up to the signing of the collective bargaining contract constituted a waiver and acquiescence by the Union, Local 1, of the elimination of said bonuses and other benefits for said employees, members of Local 1, and the acquiescence of the Union to an amendent of the profit-sharing plan, dated on or about November 1, 1960, and other amendments, which made said employees, members of Local 1, ineligible to participate in the Profit-Sharing Plan and made payment to them of their vested interest as though they voluntarily left the employ, in accordance with said amendments. The discontinuance of the bonuses and the discontinuance of the participation of said employees, members of Local 1, and the payment to them of their vested interest in said Plan many years prior to the time they were entitled to payment under said Profit-Sharing Plan, were requested by the Union, Local 1, and by employees, members of Local 1. The discontinuance of said bonuses and said amendments to the Profit-Sharing Plan were made to accord with said requests. Bonuses were continued for General Employees whether they were or were not Union members.

Fourth: Since August 1, 1955, Respondent has maintained a voluntary Profit-Sharing Plan known as the "Toffenetti Fifteen-Year Profit Sharing Plan" for the benefit of all its employees.

Article II (1) of the Plan provides as follows:

> (1) "*Normal Distribution Date*": The first day of the Company's fiscal year following the Company's fiscal year in which an Employee completes fifteen years of participation in the Plan or attains the age of sixty-five years, whichever event shall first occur."

Article VII, Section 1 of the Plan with respect to distribution provides as follows:

> "Section 1. *Normal Distribution Date.* At any time, or from time to time, after a Participant's Normal Distribution Date the Trustees may, at the request of the Participant, but solely in the discretion of the Trustees, pay all or any part of his share in the Trust Fund to him: provided that the entire share of a Participant, or the portion of such share remaining in the hands of the Trustees at the time, shall be paid to the Participant upon his leaving the Company's employment following his Normal Distribution Date. If a Participant remains in the employ of the Company following his Normal Distribution Date he shall continue to be a Participant in the Plan and his share in Contributions and Remainders thereafter accruing shall be fully vested."

Article VII, Section 4 of the Plan with respect to distribution provides as follows:

> "(c) * * *
>
> "Distribution to a Participant of his restated share in the Trust Fund shall not be made prior to the time he would have reached his Normal Distribu-

tion Date if he had remained in the Company's employ, except in the case of his death or disability. * * *"

Respondent further alleges that the employees, members of Local 1, are still in its employ.

Fifth: Respondent alleges that it did not refuse to bargain in good faith with Local 1 and that the bargaining resulted in a collective bargaining contract dated October 14, 1960, and it further alleges that no request was made for a copy of the Profit Sharing Plan during negotiations. However, a full written description and explanation of said Plan hung on the wall of the office since October 1956 and throughout negotiations. This description was always available for inspection by the employees and Union Local 1. Respondent further admits that on March 17, 1961, Local 1 requested a copy of the Plan and amendment, which was refused because there was no provision in the collective bargaining contract for same. However, a copy of the Plan and a copy of the amendment were made available for their inspection.

Sixth: Respondent alleges that it is not obliged by law to continue bargaining with the Union, Local 1, on the subjects of Bonuses or Profit-Sharing Plan, or with respect to their discontinuance. Respondent further alleges that Local 1 in obtaining its first contract bargained away its rights to the benefits, including Profit-Sharing Plan and Bonuses, by not getting the company to agree to a contract provision providing for their continuance.

Seventh: Respondent alleges that on or about May 9, 1960, the Regional Director certified "Dining Room Employees Union, Local 1, AFL-CIO" as the exclusive bargaining representative of Waiters, Waitresses and Busboys, after a consent election based on a stipulated unit, which was inappropriate in that it eliminated important segments of employees who should have been included in an appropriate

unit, and were denied the right to vote for or against the Union, Local 1, as bargaining agent. Respondent further alleges that there was no determination of an appropriate unit by the Board on the merits and that there is a question concerning the majority status.

Eighth: Upon information and belief, Dining Room Employees Union, Local 1, is guilty of unfair labor practices.

Ninth: Respondent verily believes that the National Labor Relations Act is unconstitutional in that it deprives employees and employer of life, liberty and property without due process of law; it is police-power legislation which is quasi-criminal in its punishment; and it is too indefinite, inadequate and uncertain for the purpose of protecting the rights of the people.

Tenth: Respondent alleges and sets forth as its defense the terms of the collective bargaining contract, dated October 14, 1960, and the terms of the Profit Sharing Plan and amendments thereto, and same are by reference incorporated and made a part hereof.

WHEREFORE, Respondent respectfully demands that the complaint be dismissed.

Dated: New York, N. Y.
July 21, 1961

TEITELBAUM & TEITELBAUM
/s/ PAULINE TEITELBAUM
Pauline Teitelbaum
Attorneys for Respondent

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No. 854

In the Supreme Court of the United States

October Term, 1962

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v.

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880807—63

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 41–42) is reported at 311 F. 2d 219. The Board's decision and order (B.A. 2–10) [1] are reported at 136 NLRB 1156.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1962 (Pet. 41–42), and a petition for rehearing *en banc* was denied on December 26, 1962 (Pet. 43). The petition for certiorari was filed on March 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "B.A." refers to the appendix to the Board's brief in the court below.

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's findings that petitioner discriminated against union members and refused to bargain with a duly certified union in violation of Sections 8(a) (1), (3), and (5) of the National Labor Relations Act.

2. Whether the Board's order is valid and proper.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 6–7 of the petition.

STATEMENT

The Board's Findings of Fact.—On February 29, 1960, Dining Room Employees Local 1, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, filed a representation petition with the Board for a unit of "all waiters, waitresses, and busboys" at petitioner's New York City restaurant (B.A. 13; 197–200). Thereafter, the Bartenders Union of New York City, Local 15, Hotel and Restaurant Employees and Bartenders International Union, AFL–CIO, filed a petition for a unit of the bartenders at the restaurant (B.A. 13–14; 200–203), and the Chefs, Cooks, Pastry Cooks, and Assistants Union, Local 89, AFL–CIO, filed a petition for a unit of all the employees working in the kitchen (B.A. 13–14; 203–206).

On March 22, petitioner and the unions entered into a stipulation for the conduct of representation elections by the Board on April 29, 1960 (B.A. 14; 207–

219). Prior to the elections, petitioner's chairman, Mr. Toffenetti, distributed a series of letters to the employees, some by mail and others with their paychecks. In these letters he outlined the benefits which the employees had received from him without a union, including twice a year bonuses and a profit-sharing retirement plan.[2] He pointed out that his promises were "guaranteed." Toffenetti also implored the employees to "Vote for Toffenetti" and "Vote No Union," to join "His Crusade and His Loyalty Parade," and to pray for "Victory for Toffenetti" (B.A. 14; 282–299, 302–303).

At the elections held on April 29, a majority of the waiters, waitresses, and busboys voted in favor of representation by Local 1 (B.A. 14–15; 217–219). A majority of the employees in each of the other two units voted against union representation (B.A. 15; 219–222). On May 9, 1960, Local 1 was certified by the Board (B.A. 15; 223–224).

In June and July 1960, Local 1 engaged in contract negotiations with petitioner (B.A. 15; 59). The Union proposed that the waiters, waitresses, and busboys be included in its industry-wide pension plan (B.A. 32; 62, 94). Petitioner's counsel replied that,

---

[2] The profit-sharing plan was instituted informally by petitioner in 1948. In 1956, petitioner formalized this plan by an agreement and declaration of trust entitled the "Toffenetti Fifteen Year Profit Sharing Plan," effective August 1, 1955. Under this agreement, petitioner contributes to the plan 15 percent of its profits for each fiscal year, but not more than the amount allowable as a deduction under the Internal Revenue Code provisions for qualified profit-sharing plans (B.A. 30–31; 224–258).

if those employees were included in that plan, the Company would have to exclude them from its profit-sharing plan, since it could not afford to contribute to both (B.A. 32; 62, 94). When the Union insisted that contribution by petitioner to its pension plan was a "must," the parties agreed that the employees in the unit would be eliminated from the Toffenetti profit-sharing plan, and that petitioner would begin contributing to the Union's pension plan on January 1, 1962. It was further agreed that the unit employees would receive their "vested" interests in the profit-sharing plan in accordance with the terms of the plan, and after Treasury Department approval of the distribution (B.A. 32–33; 62–63, 94–95, 289; General Counsel's Ex. 5).

On several occasions during the negotiations, union representatives requested copies of the profit-sharing plan in order to ascertain its terms. They were informed that the plan was in Chicago, but that a copy would be furnished the Union as soon as possible (B.A. 33; 66, 96). The parties also agreed that the Union would have the right to verify that the amounts to be paid to the unit employees upon the distribution of their shares in the plan were correct and in conformity with the plan's terms (B.A. 33–34; 98–99, 291).

During the negotiations, petitioner first offered a wage increase of $1 per week, and later $2 per week. The union representatives inquired whether this offer was in addition to bonuses (B.A. 17; 69–70). Petitioner's counsel replied that bonuses were a gift from the petitioner to its employees and not subject to ne-

gotiation. The union representatives stated that the employees had received bonuses for 20 years and had come to expect them as part of their wages; that they were calculated on a percentage of the employees wages, and had approximated about $2 per week on an annual basis; and that, unless bonuses were continued, the employer's offer of $2 was not an increase over the wages previously paid (B.A. 17; 70). Petitioner's counsel then replied that the economic position of the Company was such that it would have to eliminate bonuses for everybody (B.A. 18; 70–71, 100). He further stated that "in the future, should business warrant it, bonuses would be given again to all employees" (B.A. 18; 71).

On October 14, 1960, Local 1 and petitioner entered into a contract, which was to continue in effect until July 31, 1963 (B.A. 15; 263–278). Under the contract, the employees in the unit received a $3 per week increase retroactive to June 7, 1960, and additional wage increases of $1.50 per week in June 1961 and June 1962. Petitioner agreed to contribute, beginning January 1, 1961, to the Union's welfare fund, and, beginning January 1, 1962, to the Union's industry-wide pension plan (B.A. 15–16; 263–278).

On November 1, 1960, petitioner's directors met and amended the profit-sharing plan, without any notification to, or consultation with, Local 1. The amendment made any employee ineligible to participate in the plan who was then or later became a member of a union with which petitioner had a collective-bargaining agreement under which it was obligated to make contributions to a union welfare, disability,

or pension plan. The ineligibility became effective on the date union membership was acquired (B.A. 34–35; 259–262). The amendment also provided that an ineligible employee's share in the plan was to be computed at the end of the fiscal year in which he became ineligible, at the reduced percentages applicable to an employee who had voluntarily quit petitioner's employ or had been discharged for reasons other than aggravated misconduct.[3] The amendment further provided that the remaining percentage of the union employee's share was to be forfeited to the accounts of those who remained participants (B.A. 35; 261–262).

On December 8, 1960, petitioner called a meeting of all employees (B.A. 18; 73, 136). In past years, Chairman Toffenetti had announced the amount of the Christmas bonus at such meetings (B.A. 18; 135–136). This time, he referred to the "trouble" that had occurred during the year; stated that he could not help but be everlastingly grateful to those employees who had voted for him and "sorry in his heart" for those who had voted against him; and, holding up a wallet, he announced that he was giving wallets to the employees as a Christmas gift (B.A. 18–19; 74, 136–137). Employees who had been in

[3] The plan allowed immediate payment of the full amount of their shares to employees who became permanently disabled, died, or were dismissed from employment through no fault of their own. Those employees who quit or were discharged for less than aggravated misconduct received only a percentage of their shares, and this was not paid until they had been in the plan for 15 years or had reached age 65, except in case of death or permanent disability (B.A. 31–32, 33; 224–258).

petitioner's employ prior to January 1, 1960, and were not in the unit represented by Local 1, were given wallets, their regular payroll checks, and bonus checks; the employees represented by Local 1 were given only their regular checks and empty wallets (B.A. 19; 74).

Shortly after returning to his station from this meeting, Shop Steward David Dagger learned for the first time that the unrepresented employees had received bonuses (B.A. 19; 137). Seeing Chairman Toffenetti at the rear of the restaurant, Dagger complained that he was discriminating against the employees represented by the Union by giving bonuses to the unrepresented employees only. Toffenetti replied, "They showed their confidence in me and I couldn't let them down" (B.A. 19; 88, 90, 137–138). He added, "Well, if you had come to me in the first place, you wouldn't have this trouble" (B.A. 19; 89, 91, 138). Dagger said that this did not answer his question, whereupon Toffenetti asserted that the bonus was "more or less to equalize pay" (B.A. 19; 138). Dagger pointed out that the unrepresented employees had received the same benefits gained by the union-represented employees under the contract, and Toffenetti replied, "I have always given bonuses to my loyal employees" (*ibid.*).

In January 1961, Union Agent Pola and Dagger met with Chairman Toffenetti and General Manager Coscette and again protested the discriminatory payment of bonuses. Toffenetti repeated that the bonus was to equalize the wages between the unrepresented

employees and the union represented employees (B.A. 19–20; 107–108). Pola also brought up the question of when the unit employees would receive their profit-sharing distribution (B.A. 36; 108, 140). Toffenetti explained that the Treasury Department had still not approved the distribution, but indicated that the checks had already been prepared (*ibid.*). Dagger was shown his check, which indicated that he had been in the plan for 11 years, and was receiving 80 percent of his share (B.A. 36; 108–109). It was pointed out that the amounts were computed by using the percentages applicable to employees who quit petitioner's employ (B.A. 36; 155–157, 306a–306k).

In February 1961, General Manager Coscette called Union Agent Pola and told him that the distribution of the shares of the unit employees in petitioner's profit-sharing plan had been approved. Pola asked that the distribution be held up because the Union felt the employees were entitled to receive 100 percent of their shares (B.A. 37; 109–110). Pola then called Toffenetti in Chicago, and made the same request. Toffenetti stated that he would rather distribute the checks immediately and hold a meeting later. Pola agreed to this, without prejudice to the employees' right to object to the amounts of their checks. During this conversation, Pola again asked for a copy of the profit-sharing plan, which the Union still had not received. Toffenetti agreed to furnish a copy at the conference (B.A. 37; 110–111).

On March 3, 1961, petitioner distributed the profit-sharing checks to the unit employees. They received a total of $27,933.83. However, a total of $11,024.65 was "forfeited" by these employees and reallocated to the remaining nonunion participants in the plan. The highest percentage received by any employee from his account was 80 percent; employees with less than five years' participation received nothing (B.A. 37; 306a–306k).

On March 17, representatives of the Union and petitioner met at the Union's office. Pola sought to discuss the amounts which had been paid the unit employees in liquidation of their interests in the profit-sharing plan. Pauline Teitelbaum, petitioner's new attorney, replied that she could not understand the purpose of the meeting, since the profit-sharing plan was a "private affair" and not a subject to be discussed with the Union (B.A. 37–38; 74–75). Several times during the meeting, she refused to permit the union representatives to have a copy of the plan or its amendment (B.A. 38; 75–77, 78, 111–114). The meeting ended without resolving the dispute over the correctness of the profit-sharing payments made to the unit employees (B.A. 38; 76).

The Board's Conclusions and Order.—The Board concluded that petitioner's action in discontinuing bonus payments to employees in the unit represented by the Union, in paying employees represented by the Union a reduced sum for their interests in the profit-sharing plan, and in disqualifying any employee who became a union member from participation in its profit-sharing plan was motivated by a desire to penal-

ize the employees for selecting the Union and discriminated against members so as to discourage union membership. Accordingly, the Board held that, by such action, petitioner violated Sections 8(a) (3) and (1) of the Act (B.A. 20, 30, 42–43, 44, 47). The Board further concluded that petitioner refused to bargain with the Union in good faith in violation of Section 8(a) (5) and (1) of the Act by the unilateral effectuation of these discriminatory policies, and by refusing to furnish the Union, upon its request, with a copy of the profit-sharing plan and its amendment (B.A. 39–42, 47).

The Board's order requires petitioner to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act (B.A. 3–4). Affirmatively, the order directs petitioner: (1) to make available to the Union a copy of the profit-sharing plan and any amendments upon request; (2) to eliminate from the profit-sharing plan the provision making non-union membership a requirement for eligibility, and the distribution provision which discriminates against employees who become union members; (3) to restore to the accounts in the profit-sharing plan of the employees represented by the Union the amounts which were forfeited pursuant to the amendment of the plan; (4) to make the employees represented by the Union whole for the nonpayment of the 1960 Christmas bonus; (5) and, upon request, to bargain collectively with the Union regarding the distribution or other disposition of the

amounts restored to the accounts in the profit-sharing plan of the employees in the unit. Petitioner is also ordered to post the usual notices (B.A. 4–6).

The Decision of the Court of Appeals.—The court of appeals, in a *per curiam* opinion, held that the Board's unfair labor practice findings were amply supported by the record and enforced the Board's order in full (Pet. 42).

ARGUMENT

1. Petitioner's principal contention is that the evidence is insufficient to support the Board's findings (Pet. 23–33). It is well established, however, that sufficiency of the evidence does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, it is apparent, as the court of appeals concluded, that there is ample support for the Board's findings. Chairman Toffenetti's opposition to the unionization of his employees (*supra*, p. 3), his statement to Union Steward Dagger that bonuses were paid only to "loyal" employees (*supra*, p. 7), and the lack of factual basis for Toffenetti's claim that the bonus was intended to equalize the pay of the unrepresented employees with that of the union employees (B.A. 22–23) warranted the Board in finding that petitioner's motive in withholding the annual Christmas bonus from the employees represented by Local 1, while paying it to the other employees, was to penalize the union members for having selected

the Union.[4] This illegal conduct furnishes a substantial basis for concluding that the same anti-union considerations prompted the amendment to the profit-sharing plan which excluded employees who had become union members and provided for the payment to those employees of their accrued shares at a reduced percentage. Moreover the amendment to the plan discriminated against union members in violation of Section 8(a) (3) and (1) of the Act, irrespective of petitioner's subjective intent. Union membership alone determined eligibility to participate in the amended profit-sharing plan, and employees who were thus rendered ineligible were "paid out" on a basis less favorable than that used for non-union employees who were discharged without fault. Such blatant discrimination based on union membership necessarily tends to discourage union membership and is barred by the Act. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 44–46.

2. Nor is there substance to petitioner's contention (Pet. 15–22) that the Board's order is improper. The Board having found, with the approval of the court

[4] The cases cited by petitioner (Pet. 33–34) are plainly distinguishable. As the Board pointed out (B.A. 28), the holdings in those cases that the disparate treatment of represented employees in respect to bonuses and other benefits was not violative of the Act rested on: (1) the absence of any independent evidence of discriminatory motivation; and (2) the existence of a wage or salary imbalance in favor of the represented employees as the result of benefits secured by union contracts. Here, on the other hand, there is independent evidence of discriminatory motivation and there was no wage or salary imbalance in favor of the employees represented by the Union.

below, that the amendment to the profit-sharing plan unlawfully discriminated against union members, petitioner no longer has a valid interest in the maintenance of such an illegal provision. Hence, the Board, in the exercise of its broad remedial authority under Section 10(c) of the Act, can properly require petitioner to delete that provision and to restore to the accounts in the profit-sharing plan the amounts which were forfeited pursuant to the illegal amendment. This remedy is tailored to the particular violation found, and merely serves to place the parties in the same position they were in before petitioner unilaterally amended the plan to discriminate illegally against union members. That the distribution under the amended plan may have been approved by the Treasury Department (see Pet. 18) does not require a different conclusion; that department was merely concerned with the question of whether the plan satisfied the requirements of the tax laws, and not with whether it contained any features which violated the National Labor Relations Act.

Finally, petitioner errs in assuming (Pet. 15–18) that the Board lacked jurisdiction to enter the order because the Union could have processed the questions involved under the grievance and arbitration procedure of the contract. Even if that machinery was available for the determination of questions involving unfair labor practices, it is clear that this would not deprive the Board of jurisdiction to provide a remedy for those unfair practices. Section 10(a) of the Act provides that the Board's power to prevent unfair

labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." See *National Labor Relations Board* v. *Walt Disney Productions*, 146 F. 2d 44, 47–49 (C.A. 9), certiorari denied, 324 U.S. 877.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JAMES McC. HARKLESS,
Attorney,
National Labor Relations Board.

APRIL 1963.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals.

TEITELBAUM & TEITELBAUM,
1482 Broadway,
New York 36, New York,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 894

TOFFENETTI RESTAURANT COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Rehearing of Petition for Writ of Certiorari to the United States Court of Appeals.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein, by its attorneys Teitelbaum & Teitelbaum, and petitions this Honorable Court for a rehearing of its Petition for a Writ of Certiorari which was denied by this Court on April 22, 1963.

The reasons for rehearing of its petition are based upon facts which would in all justice and equity require that this Honorable Tribunal be apprised in order to grant the Petition for the Writ.

Petitioner herein made a motion in this Court returnable on the May 6, 1963 setting forth facts which

revealed gross misstatements made by the Respondent in its brief to this Court and which served to becloud the issues. The Clerk of this Honorable Court felt that these facts should be set forth in a Reply brief but at no time did Petitioner consent to the withdrawal of its motion which was made pursuant to Rule 35 of this Court and which would in the normal course of events require an answer and explanation from the Respondent. The Clerk without consent from Petitioner herein returned the motion papers.

The inconsistent and misleading statements set forth by the Respondent in its brief strike at the very heart of the question of the Petitioner's discrimination and would serve to prejudice this Court to believe so in the affirmative, and are set forth herein as follows:

1. On page 9 the Respondent sets forth, in substance, that money was forfeited by the Unit employees and reallocated to the remaining "non-union" participants in the employer's profit sharing plan. This statement is not factual and no such finding was made by the Board. The remaining participants were and still are both union and non-union employees including members of Local 89. It is obvious that the word non-union was added to lend support to a finding of anti-union animus and discrimination which did not and could not exist. [See tally of votes of three separate units; B. A. 15 footnote; R. A. 29a-30a.]

2. On page 12 the Respondent sets forth, in substance, that union membership "alone" determined eligibility to participate in the amended profit sharing plan. The Respondent fails to add that the amendment provides for elimination of union members only when they

are provided for and protected by a collective bargaining contract under the terms of which the employer undertakes to contribute to a union pension or union welfare plan on their behalf. [R. A. 50a; B. A. 42; 261.] Mainly the remaining participants were and still are union and non-union employees.

3. To confuse the issues reference is made on page 12 to ineligible employees being paid out less favorably than non-union employees discharged without fault. This analogy is confusing inasmuch as there was no finding made by the Board that an agreement was entered into between the parties to pay Unit employees as though they were discharged without fault. (Complete elimination of a job constitutes a discharge without fault.) The Respondent also fails to apprise this Honorable Court that union and non-union employees who are discharged without fault are treated alike. (See General Counsel's Exhibit 14 and case of Unit employee Anne Cullen, whose previous job was eliminated.)

4. With respect to the statement on page 9 of the Respondent's brief "that employees with less than five years participation received nothing" what the Respondent failed to reveal to this Honorable Court is the fact that more than half of the Unit employees who received nothing were employees who were not even participants in the profit-sharing plan because they were not in Petitioner's employ for two years prior to the then current fiscal year of August 1, 1960, as required by the qualification provision of the plan for all employees, union or non union. [B. A. 231-232.]

5. On page 13 appears the statement, in substance, that the remedy merely serves to place the parties in the

same position they were in before the amendment was made. This is not so. The agreement between the parties as found by the Board is that the employer would contribute to the union pension fund and "in consideration therefore" the employer would eliminate unit employees from the profit sharing plan and would promptly distribute to them "subject to Treasury approval" their vested interests. [B. A. 33; R. A. 14a.] There was no finding that elimination or distribution was subject to Union approval. There was no finding that Unit employees would receive their vested interests after Treasury Department approval of distribution as appears in substance on page 4 of Respondent's Brief. The agreement, as found by the Board made distribution "subject to Treasury approval." To place the parties in a *status quo* position would require the return of all distribution payments into the profit sharing fund as requested by counsel at the March 17, 1961 meeting [R. A. 23a] and this was refused. It would also require the return of all contributions made by the employer to the union pension fund. The forfeited money may not be sufficient to absorb the losses that may be sustained by the profit sharing plan as provided for in Article VI, Section 3, of the profit sharing plan. [B. A. 240.]

6. The Respondent states on page 8 that Mr. Toffenetti agreed to furnish a copy of the profit sharing plan at the conference of March 17, 1961. There is no such finding. The finding is that he agreed to "have a copy at the conference" [B. A. 37] and he did so. Although the union had a comprehensive description of the plan in its possession I offered to permit a stenog-

rapher to copy the pertinent provisions of the plan. [R. A. 23a.] A copy of the entire plan was not necessary for unit employees who were no longer covered by it as testified to by union's secretary. [B. A. 97.] It appears to be significant that the contract did not provide for the furnishing of a copy of the plan or amendments and that since the signing of the agreement on October 14, 1960 until after the distribution of the checks (a period of 5 months) there was no request for a copy of the profit sharing plan and no request for a copy of the amendment although the union was actually informed of the pending amendment. [R. A. 34a.]

7. Respondent's reference on page 11 of the motive for withholding the bonus from Unit employees merely serves to vary the terms of the written collective bargaining contract. This finding is not substantiated by any evidence. [R. A. 14a; 16a; B. A. 70; 101.] The Respondent's statement is also an attempt to lead the Court to believe that bonuses were paid only to non-union employees whereas in reality they were paid to union and non-union employees outside the scope of Local 1 Unit.

In the humble opinion of Counsel, if the order of the Board and the decision of the lower Court is not reversed then a contract can no longer be considered sacred. The Board in its attempt to remedy purported unfair labor practices went so far that it indeed deprives the employer of life, liberty and property without due process of law. If Congress intended that the Board be given the power, under section 10(a) of the Act, to modify a contract and a profit-sharing trust agreement, as is argued by Respondent, in substance, on pages 13-14 of its brief, then the National Labor Relations Act should

be declared unconstitutional in that it is police-power legislation. It is too undefinite, inadequate and uncertain for the purpose of protecting the rights of the people. Counsel further contends that the trial examiner erred in striking paragraph "ninth" of the Answer to the Complaint (page 51 of Petitioner's brief for this Writ).

It is humbly urged, because of the foregoing, that this petition for rehearing of Petition for Writ of Certiorori should be granted and the Petition for the Writ granted.

April 25, 1963.

Respectfully submitted,

TEITELBAUM & TEITELBAUM,
Counsel for Petitioner.